United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1418

In The

United States Court of App

For The Second Circuit

UNITED STATES OF AMERICA,

Respondent,

-against-

MICHAEL TART,

Appellant.

B P/S
ORIGINAL

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Respondent,

Docket No.: 77-1418

-against-

MICHAEL TART,

Appellant

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Preliminary Statement

This is an appeal from a judgment rendered on September 26, 1977 in the United States District Court for the Southern District of New York, convicting appellant after a jury trial of the following crimes: bank robbery, armed bank robbery and conspiracy to commit a bank robbery (18 U.S.C. § § 2113).

He was sentenced to a maximum term of 5 years on the conspiracy count and 10 years on the Third Court, said sentences to run concurrently.

Statement of Facts

Appellant and his co-defendant, David Campbell, were charged in a three-count indictment with the following crimes: conspiracy to commit bank robbery, bank robbery, and armed bank robbery.

On June 20, 1977, before the Honorable Laurence W. Pierce, a hearing was held to determine the legality of the defendants' warrantless arrests on their respective premises.

Joseph Martinolich was a special agent with the FBI assigned to the Bank Robbery Squad in the New York office. On April 4, 1977 at about 12:30 p.m. to 1:00 p.m. he was assigned to investigate a bank robbery which had occurred that day at the Chemical Bank, 534 Cathedral Parkway in Manhattan (144-145).* As case agent, he had the prime responsiblility for deciding what actions were to be taken as far as any arrests of the suspects were concerned (147).

According to the agent, he was advised that the robbery occurred at approximately 10:30 a.m. on that day. He learned that three negro males were involved and one of

the men, Wallace Hall, had been apprehended by a uniformed police officer within 10 or 15 minutes from the time of the robbery at a subway station which was a short distance from the bank. Hall was taken to the 26th Precinct where he was interviewed. The agent was informed that the bank robbers had a shotgun and additionally a pistol was exhibited by a second robber. A .32 caliber loaded pistol was recovered in the vicinity of the subway station where Hall was apprehended (149-150).

Agent Martinolich stated that Hall had told the police that the other two robbers were named "Mike" and "Dave," (150) and both of these individuals lived at 578 Academy Street in upper Manhattan (151). Mike lived in apartment 4B of this building and Dave had a basement apartment on Post Avenue (158). The apartments were in the same building (159). Hall had already been identified by bank witnesses as one of the perpetrators of the crime (153). Additionally, the agent testified that the cameras in the bank had been activated during the robbery and the film had been taken to Long Island City for development (151). He was informed that the processing of the film would take 3 to 4 hours (152).

Agent Martinolich maintained that he had been receiving information regarding the case on a continual basis but had received all of the aforementioned information at about 2:30 p.m. or 3:00 p.m. that day (152).

At about 3:00 p.m., the agent met with Detective Stein and other major case detectives at a coffee shop in upper Manhattan (154). At this time, he had also received descriptions of the two unapprehended perpetrators of the robbery (156).

At about 4:00 p.m. he personally had a conversation with Hall to clarify where Mike and Dave lived since the agents had discovered that there was not an apartment 4B in the 579 building on Academy Street, but there was such an apartment in the 571 building. The agent explained that both of these buildings had a common entrance (160). Hall further told him that the basement apartment could be identified by the blue or green rug that was in the doorway (161). Martinoloch claimed that they were attempting to verify Hall's information (162). Prior to his conversation, some detectives went to the building to check out the story (162-163). This is when he discovered the discrepancies in

Hall's story and this prompted the agent to talk to Hall personally (164). After his conversation, some detectives verified Hall's information regarding the carpet and the apartments (164-165). Hall also told them that Mike and Dave were probably unaware of his arrest (178). Moreover, he told them that Dave was the one who had the shotgun (179).

After his conversation with Hall, the agent went to the film laboratories in Long Island City to pick up the film at about 4:15 p.m. (174). He was in the film laboratory about 4:30 to 4:45 p.m. (175). He then returned to the precinct at about 5:15 p.m. to 5:30 p.m. (180). There an arrest plan was formulated (181) and particular agents and detectives were given various assignments (181).

The court then queried why the agents didn't get an arrest warrant at this time (181-182). The witness responded:

> . . . while I was in the FBI office, prior to 4:15, I had a conversation with United States Attorney Barry Kingham, who is the Chief Criminal Assistant who handles presentations. He gave me an oral authorization to proceed with my arrest plan (182).

The court in turn asked "where in the United States Codes do you fined authorization vested in the United States Attorney's office to make an arrest without a warrant." (182). The government pointed out that the judgment to effect an arrest without a warrant is made by the United States Attorney's office (184).

Agent Martinolich further testified that the arrests of Tart and Campbell were made between 6 p.m. and 6:20 p.m. (204). The agent claimed that the arrests were not made earlier because they did not have the bank surveillance reports until 5:00 p.m. and also because the interview with Hall was a continuing one wherein they hoped he would give more information (205). However, he did not get more information from Hall after 4:00 p.m. (206). Regarding the bank photographs, it was Agent Martinolich's opinion that it would be better for them to have photographs to look at rather than just relying on the general descriptions (206-207).

The agent also maintained that if the arrests were delayed, there would be a risk of flight on the part of the suspects (209). This belief was premised on his prior experience in investigating other bank robberies (210). The court interjected that instead of eating at the coffee shop, they could have gotten a warrant at 5:00 p.m. (210).

The agent stated that he led the arrest team into appellant Tart's apartment (210), while Agent Higgins attempted to apprehend Dave (210-11). They arrived in the vicinity of 571 Academy Street between 6:00 p.m. and 6:30 p.m. (211). The agent explained that in his opinion surveillance of the neighborhood made up of predominantly Hispanic and black persons would be impossible (211).

According to Martinolich, he, Detective Stein, Detective Stiastny and Agent Carman went directly to apartment 4B at 571 Academy Street (215). He knocked on the door and stated in a loud voice, "FBI, open up." During this period, they heard some noise in the apartment (216), and he had the impression that someone was looking through the peephold. The agent then heard footsteps walking away from the door (216). At that point the door was broken down and they proceeded to search the apartment. Because of the darkness in the apartment and the confusion, one of the detectives fell (217). He jumped over the detective's prone body and ran directly into a partition which separated the hallway from the living room area (217). Consequently, he ripped the partition from the wall and went after the individual he had seen turn the corner (217). When he reached the bedroom, it was very dark (218). Appellant Tart was standing there and was then placed under arrest (219). Appellant was thrown on the bed in a spread-eagle fashion and

was handcuffed by a detective (2290. During this interval, the closet behind them opened and a female and small child emerged (220). He denied that any officer had struck appellant but he did admit that appellant regurgitated in the bedroom (221). While in the bedroom, he observed a gray pair of checkered slacks and a blue coat lying over the arm of a chair which was by the bed (222). The pants and coat appeared to be similar to those worn by one of the robbers (225). Shortly thereafter, Agent Carman told him that he had located a sum of money partially wrapped in a tinfoil wrapper on top of a loft bed in the living room area of the apartment (224).

According to Agent Martinolich, after appellant was taken to the FBI headquarters, he was advised of his constitutional rights, but refused to acknowledged this in writing (228). Appellant then made some statements to them (229).

Agent Martinolich admitted that he never asked any officers or agents to go down to the Southern District to obtain arrest warrants (250). Additionally, he had no specific information that the two suspects intended to flee (255). He further admitted that if they had specific information that someone was to flee, they'd move faster to get there before he left (256). The agent claimed that in the Southern

District it usually took at least three hours to obtain an arrest warrant, although it only would take about 30 minutes to draft an affidavit in support of the arrest warrant (258).

DETECTIVE JOHN STEIN testified that he was assigned to investigate the instant bank robbery at about 10:30 a.m. (311). When he arrived at the scene, Wallace Hall, one of the suspects in the robbery, had already been taken into custody. He was told that one of the witnesses at the bank had identified Hall as one of the robbers. He was also told that there were three robbers in all, and that one had a shotgun and another had a handgun. The detective asserted that a handgun had been recovered when Hall was arrested but the shotgun had not yet been found (315). According to Detective Stein, he interviewed Hall at the precinct at about 1:00 p.m. It was then that Hall stated only that he had gone to the bank with two others; that these two others were from his neighborhood and known to frequent the front of a building at the corner of Academy and Post Avenues; and that he knew these men by their first names, Mike and Dave (314-135). Additionally, Hall described the location where the two suspects resided and indicated that one of the suspects was married and had a daughter. He designated the building on the northwest corner of Academy and

Post and further stated that the ground floor entrance could be identified by a blue runner or rug (315). Stein gave all this information to the FBI agents at about 2 or 2:15 p.m. (317).

At about 3:00 p.m., he, Detectives Gannon and Hallohan went to a restaurant in the neighborhood for lunch (318). They were later joined by some FBI agents. Together they discussed the information they had thus far received concerning the robbery and discussed what steps were to be taken to apprehend the other suspects (319). They were at the restaurant for about 45 minutes to an hour. However, the men did not discuss obtaining arrest warrants (358). He then returned to the station house (319, 354). From the precinct, he and two other detectives drove to the Academy Street area, but did not at that time enter any building (320). It was only at 5:00 p.m. that they returned to the area and entered the designated building (320). They returned to the precinct at 5:25 p.m. (322).

At this point, the government and counsel stipulated that at the time of the arrests, it was not yet nighttime (328).

Detective Stein then went on to describe the arrest of appellant (335).

Defense

POLICE OFFICER JOHNNY REID, assigned to the 34th Precinct, stated that 571 Academy Street falls within the precinct confines (411). He stated approximately 290 officers are assigned to this precinct and of this total, there are approximately 12 black and 13 Hispanic officers (412). According to the officer, on April 4th, both he and his partner, Edward Mitchell, who is also black, were on duty (412). It would take only 10 minutes for a black or Hispanic officer to go from the precinct to the Academy Street address (413).

The officer acknowledged that he knew both appellant and Campbell (414) He described Campbell as a close associate (415).*

The Trial

On April 4, 1977, at approximately 10:30 a.m. the Chemical Bank at 543 Cathedral Parkway in Manhattan

*The court, in a decision dated September 16, 1977 denied a motion to suppress.

was robbed of about $10,000 by three men (24).

MR. JOHN C. O'SHAUGNESSY, the manager of this branch, testified that the bank has three surveillance cameras located about 10 to 12 feet high on the wall behind the teller stations. These cameras take a picture every 34 seconds (23). At approximately 10:30 a.m. on April 4th, he observed two men enter the bank. One had a pistol and the other was carrying a shotgun (24). The man with the shotgun pointed it at him and ordered him to bo down on the floor. He then heard somebody say "just give us two minutes." (24) This witness also identified a card pertaining to the checking account of one Sheba Jones, who designated as her spouse, Michael Tart (33-35).

PAULINE WALLASTON, head teller at the branch, testified that she observed a black fellow jump over the teller's counter of Margaret Dowd and begin to take money out of the teller drawers, putting it into a canvas bag. She described this man as tall, wearing glasses and plaid pants with white stripes. A second man, who had a pistol, jumped over Raymond Wilkin's counter and told everyone to get down (45-47). She identified appellant as the man who had jumped over Dowd's counter (47-48). According to Miss

Wallaston, she only saw two bank robbers and did not see a man carrying a shotgun (65).

MARGARET DOWD, a utility clerk at the bank, testified on the morning in question she was filling in as a teller (67). A black man jumped over the counter and grabbed about $1870 from her (68). He then proceeded to other tellers' counters (69). She also observed a second man, poised on the top of the counter who was pointing a gun at them (69). She too only observed two men and did not see a man with a shotgun (71).

LENA JACKSON, a part-time teller at the bank, testified that a man approached her and angrily stated that this was a bank robbery (76). The man vaulted over the counter and began removing the money from the drawers (77). She observed a second man who had been carrying a small gray handgun (78). When asked to identify the man who had jumped over the counter, counsel protested that this witness had not viewed any lineup and was in the control of the government who should have conducted said lineup. Counsel further stated that pursuant to his request, four other people had viewed lineups set up by the government (78-79). According to counsel, the show-up identification in the courtroom was inherently unfair (79). The government relied on United States v. Estremera, 531 F.2d 1103 wherein this Court sustained an in court identification. Whereupon, the court told the government

to proceed and the witness then identified appellant as that man (81). Miss Jackson maintained that when she saw appellant at the bank, he was not wearing glasses (83). The witness acknowledged that although other employees in the bank were told to view a lineup, she was not (85).

At the conclusion of this witness' testimony, counsel claimed that on May 20, 1977 he wrote Assistant United States Attorney David Patterson a letter requesting that a lineup be held in behalf of his client (98-99). Counsel distinguished Estremera, claiming that in that case counsel made an untimely request for a lineup, whereas in this case, he had made a timely request (100). Counsel therefore requested a mistrial which the court denied (101, 103).

WALLACE HALL, convicted of several crimes, testified that he had known the defendant Campbell, who lives in the same building, but which has separate entrances. His address was 571 Academy Street while he lived at 579 Academy Street. (115-116). He only knew Campbell by his first name, Dave (116). The witness claimed that he also knew appellant who lived in apartment 4B. According to this witness, the three of them had robbed the bank on April 4th (118). Their plan to

rob a bank was initiated in the middle of March when his electricity was turned off because he didn't have any money (120-21). He told appellant about this and appellant acknowledged that he too needed money (123). He also had a similar conversation with Campbell (125). Hall further stated that on March 25, 1977 at 2:45 p.m. the three of them, while in the backyard of his building, discussed robbing a bank on 207th Street (126). He informed the men that he had a .32 caliber pistol, and Campbell represented that he was going to get a shotgun from his brother, Junior Hamilton (127). Later that evening, appellant told him that they were going to check out the bank on 207th Street (128). On the following Saturday (March 26th), Campbell asked him to get the shotgun from Hamilton (130). Thereafter, they went to the bank on 207th Street (131-132) but Hall protested that the bank was too close to their area (133). However, on March 31st, appellant said there was a bank on 110th Street which his wife used to cash checks and which had no guards (137).

According to Hall, on April 1st, he brought some shotgun shells (138). And on April 2nd, he received the shotgun from Hamilton and took it to Campbell's apartment later that afternoon (144). The gun was put on the bed when appellant entered the apartment and observed it (145-146).

On April 4th, the three of them proceeded to the bank in a 1973 blue station wagen driven by someone named Jack (149-150). He went into the bank first followed by appellant and then Campbell (152-153). Campbell had the shotgun while he had a .32 caliber pistol. Appellant in the meantime jumped over the teller's counter and began to remove the money from the drawers (153-155). Hall in turn was sitting on top of the counter (156). Appellant and Campbell left the bank first and when he left the bank, both men and the station-wagen were gone (170). When he tried to get on the subway, he was arrested (171).

Later that day, Hall told Detective Stein about Mike and Dave's participation in the robbery and where they lived (172-173).

DETECTIVE JOHN J. STEIN of the New York City Police Force interviewed Wallace Hall after his arrest (320). Hall told them that he, Dave and Mike robbed the bank. He also told him where these two men lived (321-322). At about 6:00 p.m., he along with other officers entered appellant's apartment by forcing the door open (329-330). Appellant was placed under arrest (330) and a jacket and a pair of trousers that were on a chair were seized (333).

SPECIAL AGENT EDWARD F. HIGGINS testified that he participated in the search of Campbell's apartment after he was arrested there (376-377). He observed a white ski cap in the bedroom and also a locked nightstand. When one of the other men in the apartment produced the key, he opened it and found a shotgun (381, 382). Detective Michael Miele removed a black airline flight bag from Campbell's apartment which contained United States currency (418, 419). The currency matched the serial numbers on the money taken from the bank (437).

Defense

Both appellant and his co-defendant raised the defense of alibi. Specifically, appellant testified that he had engaged in the following activities on the day of the robbery: appellant, 24 years of age, who was married and had a seven year old daughter, resided with his family at 571 Academy Street. He had been supporting himself by taking numbers (693-695). As a result of this activity, he had a total of $1130 in cash in his apartment on April 4th (696). Appellant acknowledged knowing his co-defendant for at least four years and stated that he, along with other fellows, had a key to Campbell's apartment (699).

Appellant denied robbing the bank at Cathedral Parkway on April 4th (701). He knew Hall but did not consider him a friend (702). In fact, appellant maintained that in November of 1976, Hall held up the manager of the candy store and fired a shot at this man (703). From that point on, they were not on speaking terms although he saw him in the area (706). Appellant admitted that about a week before the incident, he saw Hall along with Junior Hamilton enter Campbell's apartment, carrying a brown paper bag (706). The bag contained a broken down shotgun (707). Appellant denied ever having a conversation with either Hall or Campbell that day in regard to utilizing the shotgun in the robbery (707).

On April 4th, he woke up about 8:10 a.m. when his wife left for work. He then gave his daughter breakfast and went to the candy store to pick up a newspaper, some cigarettes and number sheets (708-709). At about 9:00 a.m., he entered Campbell's apartment and asked if he wanted to have breakfast with him, to which Campbell responded affirmatively (709).

Thereafter, he made his rounds to pick up his numbers work (710). At 10:30 a.m., he stopped at Nilda's grocery store and at 10:45 a.m. he returned home to total his number sheets (710-711). At 11:00 a.m., he went outside to pick up some more figures from a few people and then met Campbell,

who was talking to two police officers on the corner of Academy Street and Sherman Avenue (71). At about 11:30, he and Campbell went for some breakfast at the Nash Restaurant (712).

At about 6:00 p.m., the police arrived at his apartment (713-714) and placed him under arrest. Appellant maintained that he had been wearing glasses since he was 2 or 3 years old (722). He claimed he didn't participate in any bank robbery either with or without his glasses (723).*

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*Dr. CHarles Kramer, a specialist in ophthalmology, testified that he had recently examined appellant's eyes and that he suffered from a moderate degree of myopia in both eyes (779-80).

ARGUMENT
POINT I

IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, THE WARRANTLESS ARREST OF APPELLANT IN HIS OWN HOME WAS IN DIRECT CONTRAVENTION OF THE FOURTH AMENDMENT, THEREBY REQUIRING THE SUPPRESSION OF ALL EVIDENCE SEIZED INCIDENTAL TO THAT UNLAWFUL ARREST.

Admittedly, the law enforcement agents possessed probable cause to arrest appellant. However, the critical issue raised by this appeal does not center on the issue of probable cause, but concerns only the legality of the agent's warrantless daytime arrest of appellant in his own home. We submit that in the absence of any exigent circumstances, it was incumbent upon the agents to first obtain a warrant before entering appellant's home to effect his arrest. Their failure to obtain such a warrant vitiated the ensuing arrest and thus mandates the suppression of all evidence seized as a result of the tainted arrest. Jones v. United States, 357 U.S. 493 (1958); United States v. Watson, 423 U.S. 411 (1976); cf. Titus v. United States, 445 F.2d 577 (2d Cir. 1971) cf. United States v. Stefano, 555 F.2d 1094 (2d Cir. 1977); United States v. Jarvis, ___F.2d.___(2d Cir., decided 7/26/77).

An examination of the instant record readily reveals that appellant's arrest was effected between 6:00

and 6:20 p.m. Yet, the agents possessed the requisite probable cause to effect a valid arrest well before this critical hour. Detective Stein frankly acknowledged that he had turned over all the information he had possessed to the FBI at about 2:00 p.m. or 2:15 p.m. of that day. And there seems to be no doubt that the information possessed at this time was sufficient to establish probable cause to arrest both appellant and Campbell. Detective Stein personally interviewed the bank employees who had unequivocally identified Hall as one of the perpetrators of the robbery; Hall thereafter told the detective that he, together with "Mike and Dave" had robbed the bank; and most important, Hall told the detective the exact locations where the suspects lived (314-317). Agent Martinolich similarly admitted that he had received all of the above information by 2:30 p.m. or 3:00 p.m. on that day. Hence, predicated upon this substantial and reliable information, there was no excuse whatsoever that would justify the law enforcement's failure to obtain the requisite arrest warrants.

The court below in denying the instant motion to suppress based its decision on two separate theories. First, the court concluded that the agents under all the circumstances acted reasonably and second, the court was of the opinion

that there did exist in this case exigent circumstances that would justify the warrantless arrest. An analysis of the court's rationale in conjunction with the facts of this case and existing case law will establish that the court's reasoning will not pass the test of constitutionality in accordance with our Fourth Amendment standards.

Our threshold inquiry must necessarily commence with the examination of the recent United States Supreme Court decision which indirectly dealt with an analogous situation.

While the Supreme Court in United States v. Watson, 423 U.S. 411 sustained a warrantless public arrest, the Court specifically limited its decision to a warrantless arrest effected in a public place. The question raised herein was specifically left open by the court - to wit, whether or under what circumstances an officer must obtain a warrant before he may lawfully enter a private place to effect an arrest. Since this issue was not decided by the court, it would thus be helpful to look to Justice Marshall's dissent in Watson -- in which Justice Brennan joined -- wherein the Justice expressed his position on the instant question.

Justice Marshall's position reveals that his stance is the appropriate response to questions of this nature and ought to be adopted by this Circuit.

First, Justice Marshall articulately denigrated the court's finding below that the agent's conduct in failing to procure a warrant could be deemed constitutional as long as it could be characterized as reasonable. In this context, Justice Marshall declared:

> The rule the Court announces today for arrests is the reverse of this approach. It is, in essence, the Rabinowitz rule: 'The relevant test is not whether it is reasonable to procure [an arrest] warrant, but whether the [arrest' was reasonable.' United States v. Rabinowitz, 339 U.S. 56, 66, 94 L.Ed. 653, 70 S.Ct. 430 (1950). In the search context, Rabinowitz has been overruled, Chimel v. California, supra, 764-768, 23 L.Ed. 2d 685, 89 S.Ct. 2034, and thoroughly discredited, see, e.g., United States v. United States District Court, supra 407 at 315 and n. 16, 32 L.Ed 2d 752, 92 S.Ct. 2125. The Rabinowitz approach simply does not provide adequate protection for the important personal privacy interests codified in the Fourth Amendment. Given '[t]he history of the use, and not infrequent abuse, of the power to arrest.' Wong Sun v. United States, 371 U.S. 471, 479, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963), and the fact that arrests are in terms, as fully governed by the Fourth Amendment as searches, the logical presumption is that arrests and searches should be treated equally under the Fourth Amendment. 423 U.S. at pp. 444-445.

Consequently, in accordance with Justice Marshall's view, no search or an arrest can ever be deemed reasonable if it fails to satisfy constitutional standards. Adoption of Judge Pierce's theory would be tantamount to obviating any constitutional requirement as long as the law enforcement's actions could be deemed reasonable.

In any event, we maintain here that the law enforcement agents did not act reasonably in failing to obtain a warrant before the arrests were effected. Both the government and Judge Pierce appeared to have concluded that the procurement of an arrest warrant in this case would have hampered the agents' continuing investigation and would have exposed the agents and innocent citizens to unnecessary danger. Such permises are totally devoid of merit. The agents could have obtained the requisite warrant and continued with their investigations before actually effecting the arrests here. The government below conveyed the impression that the agents would have been compelled to curtial their investigation the moment they obtained the requisite probable cause to arrest. As Justice Marshall so aptly pointed out in his dissent in Watson, an arrest warrant, unlike a search warrant, will continue to be valid for an indefinite time since once probable cause to arrest exists, it will exist into the future if no intervening exculpatory facts are uncovered. And further, if exigent

circumstances should develop during the continuing investigation that require an immediate arrest, such an arrest could properly be made even in the absence of a warrant. Thus, applying this rationale to the instant case, it is clear from this record that at approximately 3:00 p.m., the agents had obtained sufficient information to procure a valid arrest warrant. They could have procured such a warrant and could have also continued to verify the suspects' address and obtain the bank film from the laboratory. The former action certainly did not preclude the latter. It is indeed incredible that the court below, or any court for that matter, would sacrifice a defendant's constitutional rights because of the inefficiency of our court system. Judge Pierce accepted Agent Martinolich's conclusory statement that it took approximately 3 hours to obtain a warrant in the Southern District. Even if such were the case, a defendant cannot be expected to forfeit his critical constitutional rights due to the failure of our court system to facilitate a relatively simple procedure.

Furthermore, we would take issue with the court's conclusion that the exigent circumstances existed in this case which would dispense with the need for a warrant. The only exigent circumstance presentedhere was the possibility

of escape by the suspects. It is suffice to say that this contingency exists in virtually all cases and unless there is strong proof to point to such a happenstance, the government cannot be permitted to rely on this possible contingency to obviate their need for an arrest warrant. Otherwise, there would be absolutely no need for any warrant to arrest and the Fourth Amendment guarantee would be reduced to a nullity. Ironically, while the government claimed the fact of exigent circumstances in the court below, it cannot be overlooked that during this so-called state of emergency, the agents and local law enforcement agents took at least an hour of this critical time to enjoy a coffee break. Thus, it cannot be concluded that the agents acted either reasonably in this case or pursuant to any exigent circumstances. United States v. Price, 345 F.2d 256 (2d Cir. 1965); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1976); Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

Significantly, the decisions in this Court reflect an ambivalency on the part of the court to deal with the present question.

In Titus v. United States, 445 F.2d 577 (2d Cir. 1971), a case relied upon by the court below, this Court sanctioned a warrantless arrest in the defendant's home only

because of the peculiar nature of the facts therein. Upon comparing the facts of both cases it must be concluded that the exigent circumstance of escape in Titus was far more a reality than the threat of escape in this case. Not only had Titus' accomplice been apprehended, but the Buffalo City Police had broadcast the news of the accomplice's arrest over the radio network. Thus, it was imperative that the law enforcement officials arrest Titus before he heard the news broadcast. Such an unusual occurrence did not exist here as the agents were only speculating on the possibility of escape.

Subsequently, in United States v. Stefano, 555 F.2d 1094 (2d Cir. 1977), this Court admittedly did sanction a warrantless arrest in a defendant's home on facts similar to the present case. However, shortly thereafter, in United States v. Jarvis, ____F.2d____ (2d Cir., decided 7/26/77), this Court specifically held that the forcible entry into Jarvis' home without a valid warrant and in the absence of exigent circumstances does not meet the requirement by the statute or Fourth Amendment standards. Thus, the Jarvis decision evidently reflects a recognition by this Court of the necessity of law enforcement officials to obtain an arrest warrant before entering a defendant's home. Such a holding impliedly overrules its prior Stefano decision.

Hence, considering all the facts and circumstances of the present case, it should be concluded that the failure by the agents to obtain the requisite warrant vitiates the arrest, thereby requiring the suppression of all evidence seized incidental to that unlawful arrest.

POINT II

THE FAILURE BY THE GOVERMENT TO HOLD A PRE-TRIAL LINEUP FOR ALL EYEWITNESSES PURSUANT TO DEFENSE COUNSEL'S REQUEST CONSTITUTED REVERSIBLE ERROR.

It cannot be denied that the identification of appellant by the eyewitnesses to the robbery virtually clinched his conviction on the substantive robbery counts. It was thus imperative that these eyewitness' identifications be tested fairly in order to avoid any semblance of suggestive influence. Clearly, nothing could be more suggestive than permitting a witness on the stand at trial to point to the man sitting in the defendant's chair as the perpetrator of the crime. Yet, that is what occurred in this case. Despite a timely request by counsel that a lineup first be held, this request was denied and Lena Jackson was then permitted to make an in-court identification of appellant. We submit that the failure by the court to first permit a lineup before the witness made her in-court identification constituted reversible error.

While it has been established that a defendant has no constitutional right to a lineup (United States v. Boston, 508 F.2d 1171 (2d Cir. 1974), cert. denied 421 U.S. 1001 (1975); United States v. Ravich, 421 F.2d 1196 (2d Cir.), cert. denied

400 U.S. 834 (1970), nevertheless, this Court can make the determination that Judge Pierce abused his discretionary power in failing to hold the requested lineup.

In the context of this case, it was imperative that a lineup be held to assure that Miss Jackson's identification was free from any hint of suggestive taint.

The government, in opposing the request for a lineup relied on this Court's decision in United States v. Estremera, 531 F.2d 1103 (2d Cir. 1976). However, this decision can readily be distinguished from the facts of the present case. First and foremost, the witness in Estremera had already made a photographic identification of the defendant prior to trial and this identification procedure was not contested as unfair or improper in any manner after a pre-trial Simmons hearing. As opposed to Estremera, there was no pre-trial testing of Lena Jackson's identification of appellant. Second, this Court concluded in Estremera that counsel's request for a lineup was not made in a timely fashion. Here, however, as early as May 20, 1977, counsel in a letter to Assistant United States Attorney Patterson requested that a

lineup be held in behalf of his client. Oddly enough, the government did set up a lineup in which four persons viewed appellant. For whatever reason, the government simply did not ask Miss Jackson to view any lineups although she was readily available. In fact, she testified at trial that she was well aware that other employees were instructed to view a lineup, but she never received such an instruction.

Consequently, Miss Jackson's in court identification of appellant constituted an outright show-up, a procedure which has been repeatedly condemned by the courts as being inherently unfair.

In this light, the government cannot successfully argue that said error was harmless in view of the other evidence in this case since the eyewitness identification by Miss Jackson could very well have been the compelling factor which convinced the jury to convict appellant. Significantly, the co-defendant Campbell was acquitted of the substantive robbery charges. Obviously, the jury did not give much credence to Hall's testimony that both appellant and Campbell participated in the robbery. Campbell was acquitted of these charges despite additional evidence that the proceeds from the bank

robbery, along with the shotgun, were found in his apartment. Under these circumstances, the inference may be fairly drawn that the jury gave great weight to the eyewitness identifications as no eyewitness identified Campbell. Although it is true that another witness, Miss Wallaston, had also identified appellant, Miss Jackson's tainted identification had the unmitigated effect of bolstering the other witness' identification of appellant.

In sum, therefore, it must be concluded that the court's refusal to hold a lineup constituted an abuse of its discretion, thereby requiring the reversal of appellant's conviction.

CONCLUSION

FOR ALL THE FOREGOING REASONS, APPELLANT'S JUDGEMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED; PURSUANT TO POINT II, A NEW TRIAL SHOULD BE AFFORDED APPELLANT.

Respectfully submitted,

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December, 1977.

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

~~Respondent~~

- against -

Respondent.

MICHAEL TART & DAVID CAMPBELL,

Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Reuben A. Shearer, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030.

That on the 12th *day of* Dec. *19* 77 *at* 1 St Andrews Plaza New York, N.Y.

deponent served the annexed Appendix Brief *upon* Robert B. Fiske, Jr.

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 12th *day of* Dec. *19* 77

Reuben A. Shearer

Reuben A. Shearer

ROBERT I. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979